

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-1682-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TODD A. WILD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
JOHN R. WAGNER, Judge. *Affirmed.*

DYKMAN, P.J.¹ Todd A. Wild appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OMVWI), contrary to § 346.63(1)(a), STATS. Wild contends that his arrest was not based on probable cause. We conclude that the officer had probable cause to arrest Wild. We therefore affirm.

¹ This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

BACKGROUND

On January 6, 1996, Wild was arrested for OMVWI. He was charged with OMVWI, second offense, and operating a motor vehicle with a prohibited alcohol concentration, second offense. Wild brought a motion to suppress, arguing that the arrest was not based on probable cause.

At the motion hearing, Grant County Deputy Sheriff Edward R. Breitsprecker Jr. testified that on January 6, 1996, at about 8:56 p.m., he was talking with Officer James Kopp in Dickeyville when they received a report of an individual at the IOCO station in Dickeyville who had been in an automobile accident. Breitsprecker drove to find the accident site, and Kopp drove to the IOCO to meet with the driver. Breitsprecker was unable to locate the accident site. At the request of Kopp, Breitsprecker then drove to the IOCO. At the IOCO, Breitsprecker met with Todd Wild, the individual involved in the accident. Wild was being attended to by rescue squad personnel. Breitsprecker noticed that Wild's speech was slurred, his eyes were red, and a strong odor of intoxicants was emanating from Wild. Wild admitted that he was the only person in the vehicle and described his car's location. Breitsprecker informed Wild that he was under arrest for OMVWI. Breitsprecker did not conduct any field sobriety tests and did not ask Wild how much he had had to drink prior to the arrest.

Kopp also testified at the hearing. He testified that when he arrived at the IOCO station, he spoke with Wild. Kopp noticed that Wild's speech was "sluggish and slurred," that his face was flushed, his eyes were red, and that a strong odor of intoxicants was emanating from Wild's breath. Kopp concluded that Wild was under the influence of intoxicants. At the IOCO, Kopp spoke with several people who stated that they witnessed the accident. Two witnesses told

Kopp that they saw Wild's vehicle cross the yellow line and swerve back over quickly, and they believed that he sideswiped the bridge. Another witness who had come onto the scene seconds after the accident and had brought Wild to the IOCO told Kopp that he noticed an odor of intoxicants on Wild. Before Breitsprecker made contact with and arrested Wild, Kopp communicated to Breitsprecker his opinion that Wild was intoxicated and the statement of the witness who had transported Wild to the IOCO. Kopp did not ask Wild how much he had had to drink that night. He also did not ask him to perform any field sobriety tests because he was told that Wild was going into shock.

The trial court found that prior to the arrest, Breitsprecker was aware that a witness had smelled an odor of intoxicants on Wild, that Wild was involved in an accident, that Breitsprecker had the opportunity to observe Wild's slurred speech, red eyes, and odor of intoxicants, and that Kopp had told Breitsprecker that he thought Wild was intoxicated. Additionally, there was no evidence of icy conditions, and Wild did not explain how or why the accident occurred. The trial court found that Breitsprecker had probable cause to arrest Wild for OMVWI and denied Wild's motion. Wild pleaded no contest and was found guilty on both charges. Wild appeals.

DISCUSSION

Wild argues that Breitsprecker did not have probable cause to arrest him for OMVWI. Whether a set of facts constitutes probable cause is a question of law that we review *de novo*. *State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994).

In deciding whether probable cause for an arrest exists, we look at whether "the totality of circumstances within the arresting officer's knowledge at

the time of the arrest would lead a reasonable police officer to believe ... that the defendant was operating a motor vehicle while under the influence of an intoxicant.” *State v. Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986). That a reasonable officer could conclude, based on the information known to the arresting officer, that the “defendant probably committed” the offense is sufficient to establish probable cause. *State v. Koch*, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161 (1993). The officer’s belief that probable cause to arrest exists may be based on hearsay information, and the officer may rely on the collective knowledge of the entire police department. *State v. Wille*, 185 Wis.2d 673, 683, 518 N.W.2d 325, 329 (Ct. App. 1994). Finally, we may consider the conclusions that officers draw based on their investigative experience. *Id.*

The facts relevant to a determination of whether Breitsprecker had probable cause to arrest Wild are as follows: Breitsprecker knew that Wild had been in a single-car accident. He observed that Wild’s speech was slurred, that Wild’s eyes were red, and that a strong odor of intoxicants was emanating from Wild. Additionally, Kopp, who testified that he had made hundreds of OMVWI arrests over a seventeen-year period, told Breitsprecker that he thought Wild was intoxicated and that a witness smelled an odor of intoxicants on Wild after picking him up at the accident scene. Additionally, neither officer observed ice on the roads. Based on these facts, Breitsprecker formed the belief that Wild was under the influence of intoxicants and placed him under arrest. We conclude that these facts, taken as a whole, are sufficient to establish probable cause to arrest for OMVWI.

We find *State v. Kasian*, 207 Wis.2d 609, 558 N.W.2d 687 (Ct. App. 1996), instructive. In *Kasian*, we were called upon to determine whether a set of

facts constituted probable cause to arrest for OMVWI. The facts relevant to that determination were as follows:

[T]he arresting officer came upon the scene of a one-vehicle accident. The officer observed a damaged van next to a telephone pole. The engine of the van was running and smoking. An injured man, whom the officer recognized as Kasian, was lying next to the van. The officer observed a strong odor of intoxicants about Kasian. Later, at the hospital, the officer observed that Kasian's speech was slurred.

Id. at 619-20, 558 N.W.2d at 691. Based on these facts, we concluded that the arresting officer had “probable cause to believe that Kasian had operated the vehicle while intoxicated.” *Id.* at 620, 558 N.W.2d at 691-92.

Similarly, before arresting Wild, Breitsprecker knew that Wild had been in a one-vehicle accident and that he had been injured. Breitsprecker also observed that Wild smelled strongly of intoxicants and that his speech was slurred. In addition to these indicia of intoxication, which in *Kasian* were held sufficient to establish probable cause to arrest for OMVWI, Breitsprecker had other facts to consider. Breitsprecker observed that Wild's eyes were bloodshot, and Kopp told Breitsprecker that he thought Wild was intoxicated. We conclude that these facts, considered in the totality of circumstances, gave Breitsprecker probable cause to arrest Wild for OMVWI.

Wild argues that without field sobriety tests, these facts add up only to reasonable suspicion and fall short of providing probable cause to arrest. He relies on *State v. Swanson*, 164 Wis.2d 437, 475 N.W.2d 148 (1991), which provides that “[u]nexplained erratic driving, the odor of alcohol, and the coincidental time of the incident form the basis for a reasonable suspicion but should not, in the absence of a field sobriety test, constitute probable cause to

arrest someone for driving while under the influence of intoxicants.” *Id.* at 454 n.6, 475 N.W.2d at 155. But in *State v. Wille*, 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994), we explained that this language “does not mean that under all circumstances the officer must first perform a field sobriety test, before deciding whether to arrest for operating a motor vehicle while under the influence of an intoxicant.” Whether a field sobriety test is necessary to establish probable cause is a question that depends on the facts of each individual case. See *Kasian*, 207 Wis.2d at 620, 558 N.W.2d at 691. Here, as in *Kasian*, the facts are such that field sobriety tests were unnecessary to establish probable cause.

Wild also argues that *State v. Seibel*, 163 Wis.2d 164, 471 N.W.2d 226 (1991), and *State v. Krause*, 168 Wis.2d 578, 484 N.W.2d 347 (Ct. App. 1992), support the view that the facts in this case reach the level of reasonable suspicion, but not probable cause. In *Seibel*, the supreme court held that the facts were sufficient to provide a reasonable suspicion of intoxication, but arguably not probable cause, when the driver was involved in an accident after crossing the centerline for no justifiable reason, the driver’s companions smelled strongly of intoxicants, the officer thought the driver smelled of intoxicants as well, and the defendant was belligerent. *Seibel*, 163 Wis.2d at 180-83, 471 N.W.2d at 227-28, 234; see *Swanson*, 164 Wis.2d at 453 n.6, 475 N.W.2d at 155. But here, unlike in *Seibel*, Officer Breitsprecker witnessed Wild’s red eyes and slurred speech, knew that a witness had smelled intoxicants on Wild shortly after the accident, and knew that another officer experienced in OMVWI arrests believed that Wild was intoxicated. *Seibel* is distinguishable.

Finally, in *Krause* we determined that the facts amounted to a reasonable suspicion that the defendant was driving while intoxicated. See *Krause*, 168 Wis.2d at 587-88, 484 N.W.2d at 350. We did not determine whether

the facts established probable cause to arrest. Therefore, *Krause* is inapplicable to this case.

Finally, Wild argues that without an admission of guilt, the facts do not give rise to probable cause. In support of this proposition, Wild refers to *State v. Wille*, 185 Wis.2d 673, 518 N.W.2d 325 (Ct. App. 1994). In *Wille*, the indicia of intoxication were that Wille smelled of intoxicants, collided with a parked car, and at the hospital stated, “I’ve got to quit doing this.” *Id.* at 683-84, 518 N.W.2d at 329. In finding probable cause for the arrest, we distinguished *Swanson* by referring to the additional fact of this statement that constituted Wille’s acknowledgment of his guilt. *Id.*

A statement acknowledging guilt is one factor in determining whether a person is intoxicated. Intoxication may be present with or without this factor, as is true of other factors such as field sobriety tests, one-automobile accidents, swerving, slurred speech, and bloodshot eyes. Ultimately, the question of whether probable cause to arrest for OMVWI exists rests on a fact specific examination of the totality of circumstances in each individual case. We conclude that the facts known to Officer Breitsprecker, taken as a whole, were sufficient to establish probable cause to arrest Wild for OMVWI.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.